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**In the Supreme Court of the United States**  
**October Term, A. D. 1946.**

No. \_\_\_\_\_

**CHARLES P. GOTWALS, Petitioner,**

*vs.* \_\_\_\_\_

**UNITED STATES OF AMERICA, Respondent.**

**PETITION FOR WRIT OF CERTIORARI**

To THE HONORABLE THE SUPREME COURT OF THE UNITED  
STATES:

Your petitioner, Charles P. Gotwals presents this petition for writ of certiorari and respectfully states to this Honorable Court that this proceeding was begun by the United States of America on the 27th day of April, 1945, by filing in Case No. 49 Civil, Leona Richard Fox, *et al.*, Plaintiffs, *vs.* H. G. House, *et al.*, Defendants, in the District Court of the United States for the Eastern District of Oklahoma, a petition asking for the cancellation of an assignment made by H. G. House to Charles P. Gotwals of money due or to become due said House for his fees and expenses in the cause entitled, *In Re: Estate of Jackson Barnett, deceased, No. 4556-Equity*, Consolidated, originally filed in the United States District Court for the Eastern District of Oklahoma, and thereafter appealed to the United States Circuit Court of Appeals for the Tenth Circuit, and asking to have the amount due said House in said Case No. 4556-Equity applied as a part payment on the judgment rendered against

said House in said case No. 49-Civil; and by filing a similar petition asking for the same remedy in said case No. 4556-Equity. There is no order consolidating the proceedings under the two numbers, and while they were tried at the same time and only one record carried up, it was given two numbers in the Circuit Court of Appeals, one being 3287 and the other 3288.

The United States claimed a prior right to the money assigned by virtue of the provisions of Section 191 of Title 31 of U. S. Code, which section is as follows:

“Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be satisfied; and the priority established shall extend as well to cases in which the debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.”

The case, or cases, was tried before the Honorable Robert L. WILLIAMS, Circuit Judge, sitting by special assignment and judgment rendered in favor of the petitioner on the 4th day of September, 1945. His findings of fact begin on page 13 of the record and his conclusions of law on page 18 of the record. It was appealed by respondent to the United States Circuit Court of Appeals for the Tenth Circuit and reversed in an opinion filed July 19, 1946. Honorable Orie L. PHILLIPS, United States Circuit Judge, dissented and filed a written dissenting opinion. A petition for rehearing was filed and it was overruled without opinion on the 12th day of August, 1946.

The facts are that H. G. House represented some of the claimants in No. 4556-Equity, In Re: Estate of Jackson Barnett, but at the time of making the assignment to Gotwals did not know what the amount of his fee would be, but knew that he would be entitled to a fee and his actual expenses in the case.

A suit was brought against House and others in the United States District Court for the Eastern District of Oklahoma, which was No. 49-Civil, and entitled Leona Richard Fox, *et al.*, petitioners, *vs.* H. G. House, *et al.*, defendants, in which the United States of America intervened. On the 27th day of October, 1942, after the hearing in said case 49-Civil, but before any decision had been announced and before any judgment had been rendered, House made the assignment to Gotwals. The assignment appears at page 14 of the record filed herewith. Nothing had been done then to subject the fee due House to the claims against him and nothing was ever done until these proceedings were begun two and one-half years later. At that time he and Gotwals had reason to believe that a judgment would be rendered against him and judgment was rendered against him on the 7th day of November, 1942.

The United States District Court for the Eastern District of Oklahoma made an order in case No. 4556-Equity In Re: Estate of Jackson Barnett, fixing the fees and expenses of the attorneys for the different claimants. The decree or order was affirmed by the Circuit Court of Appeals for the Tenth Circuit. By its terms House was entitled to the sum of \$13,582.79 for his fee and expenses. The order of the court with reference to fees and expenses of attorneys included the fees and expenses for all attorneys for all claimants in said case. The assets of the Jackson Barnett estate were in the hands of the Indian Department. The Superintendent for the Five Civilized Tribes paid to the

clerk of the United States District Court for the Eastern District of Oklahoma out of funds in his hands belonging to the estate of Jackson Barnett, deceased, a sufficient amount to pay all the attorneys except the amount due House which had been assigned to Gotwals, and the United States then began this proceeding. No proceeding to reach the money was begun until this proceeding was begun. House never made an assignment for the benefit of creditors. The money was never in the hands of any person charged with the duty of paying it to the creditors of House.

The assignment to Gotwals was made as compensation for his services for House in several important cases and the District Court and Circuit Court of Appeals both decided that the services were well worth the amount assigned.

Your petitioner states that the decision and judgment of the Circuit Court of Appeals is erroneous for the following reasons:

1. The assignment to Gotwals was a valid assignment, made for a valuable and adequate consideration and was sufficient to transfer the title to the money due House and to vest the right thereto in Gotwals.

2. The decision fails to give effect to the provisions of Section 11 of Title 24 of Oklahoma Statutes of 1941, which gives to a person the right in good faith to prefer one or more of his creditors by payment, by mortgage either real or chattel, or by the transfer of personal property or real estate.

3. The decision is in conflict with the case of *Beaston v. Farmers Bank of Delaware*, 12 Peters 102, 9 L. ed. 1017, in which the court construing the statute under which the respondent claims in this case, said:

"From the language employed in this section and the construction given to it from time to time by this

court, these rules are clearly established: first that no lien is created by the statute; second, the priority established can never attach while the debtor continues the owner and in possession of the property, although he may be unable to pay all his debts; third, no evidence can be received of the insolvency until he has been divested of his property in one of the modes stated in the section; and fourth, whenever he is thus divested of his property, the person who becomes vested with the title is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property.",

and is in conflict with the case of *Bramwell v. United States Fidelity & Guaranty Company*, 269 U. S. 483, 70 L. ed. 368, construing the same statute, in which the court said (p. 390 of Official Report) :

"Taken together these sections mean that a debt due the United States is required to be first satisfied when the possession and control of the estate of the insolvent is given to any person charged with the duty of applying it to the payment of the debts of the insolvent, and as the rights and priorities of the creditors may be made to appear.",

and is in conflict with all other decisions construing said Section 191 of Title 31 of U. S. Code.

4. The decision held in effect that the mere custody of the money gave the United States of America a lien, though its custody was for the purpose merely of paying it to House.

And your petitioner states that the grounds of this application are of the nature which under the rules of this Court appeal to its discretion in granting a writ of certiorari.

A copy of the record in the Circuit Court of Appeals is hereto attached marked "Exhibit A" and made a part hereof.

*Wherefore*, Your petitioner respectfully prays that a writ of certiorari may issue out of this Court and under its seal, directed to the United States Circuit Court of Appeals for the Tenth Judicial Circuit of the United States at Denver, Colorado, commanding said court to certify and send to this Court on a day to be designated in said writ, a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals in the actions and proceedings entitled United States of America, Appellant, *vs.* Charles P. Gotwals; Gotwals, Killey and Gibson, a co-partnership, and H. G. House, Appellees, No. 3287, and United States of America, Appellant, *vs.* Charles P. Gotwals, Gotwals, Killey and Gibson, a co-partnership, and H. G. House, Appellees, No. 3288 on the docket of said court, to the end that said cause may be reviewed and determined by this Court, and further prays that the decision, judgment and decree of said Circuit Court of Appeals be reversed and set aside by this Honorable Court, and that judgment be rendered in this Court to the effect that said assignment was valid and that your petitioner is entitled to receive the money assigned to him by said House, and your petitioner further prays for such other and further relief and remedy as to this Court shall seem just.

CHARLES P. GOTWALS,

*Petitioner,*

By MALCOLM E. ROSSER,

*His Attorney.*

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.**

It does not seem necessary to write a brief in support of the petition for writ of certiorari. The petition itself and the findings and conclusions of the Judge who tried the case in the District Court and the dissenting opinion in the Circuit Court of Appeals contain about everything that can be said. But the writer wants to say a few words more.

The statute upon which the Government relies for recovery in this case has been in effect since the very beginning of the Government. In *United States v. Oklahoma*, 261 U. S. 253-259, 67 L. ed. 638-643, Mr. Justice BUTLER gives a short history of the act. He says that it has been considered by numerous cases in the Supreme Court and further says: "No lien is created by it. It does not overreach or supersede any bona fide transfer of property in the ordinary course of business."

The statute was first construed by Chief Justice MARSHALL in *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 304, and several later cases. In *Thelusson v. Smith*, 2 Wheat. 396, 4 L. ed. 271, Justice Bushrod WASHINGTON followed the earlier cases and held that a mere state of insolvency gave the United States no preference unless there was a voluntary assignment. The decisions of these men so famous in the history of our jurisprudence should not be set aside now after they have been followed for more than one hundred and forty years. No case has been found holding that the United States is entitled to priority unless the debtor's property was in the hands of some one charged with the duty of applying the proceeds on the debts of the owner of the property.

The facts in *United States v. Hooe*, 3 Cranch, 73, 2 L. ed. 370, bear some resemblance to the facts of this case and the construction contended for here was given the statute.

CHAS. P. GOTWALS v. UNITED STATES.

The law of Oklahoma as well as the common law gives a debtor the right to prefer his creditors. (*Reidell v. Lydick*, 176 Okl. 204.)

An assignment such as was made in this case is valid even though the assignee knew that the result would be that other creditors would not be paid. (See *Van Iderstine v. National Biscuit Company*, 227 U. S. 572-582, 57 L. ed. 652-654; *Adams v. Champion*, 294 U. S. 231, 79 L. ed. 880-882.)

The decision of the Circuit Court of Appeals is not supported by any authority that the writer is able to find and it is in good faith believed that a writ of certiorari should be granted.

Respectfully submitted,

MALCOLM E. ROSSEY,  
*Attorney for Petitioner.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1946

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No. 594

CHARLES P. GOTWALS, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The district court did not write an opinion; its findings and conclusions appear at R. 13-30. The opinions of the circuit court of appeals (R. 139-147) are reported in 156 F. 2d 692.

### JURISDICTION

The judgment of the circuit court of appeals was entered on July 19, 1946 (R. 147). A petition for rehearing was denied on August 21, 1946

(R. 149), and the petition for a writ of certiorari was filed on October 10, 1946. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTION PRESENTED**

Whether, where an insolvent judgment debtor of the United States assigns to a third party creditor his claim to funds in possession of the Government with an intent to prefer that creditor over the United States, a priority in favor of the Government arises under R. S. 3466, 31 U. S. C. sec. 191, entitling it to apply the funds in question in partial payment of its judgment.

**STATUTES INVOLVED**

R. S. 3466, 31 U. S. C. sec. 191, reads as follows:

Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

11 U. S. C. sec. 21, so far as here material, provides:

*Acts of bankruptcy.* (a) Acts of bankruptcy by a person shall consist of his having \* \* \* (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; \* \* \*.

#### STATEMENT

The facts in this case are not in dispute. The United States, on behalf of restricted Indian wards, sued one H. G. House for an accounting of certain restricted funds and property. *Leona Richards Fox et al., and The United States, Intervenor v. H. G. House*, Civil No. 49 (E. D. Oklahoma), hereinafter referred to as the *House* case. Following trial the district court on October 12, 1942, entered its findings and conclusions (R. 91-124), in which the court concluded that House was liable to the United States in the amount of \$39,583.00. Judgment in favor of the Government against House was entered on November 7, 1942, in the amount of \$76,860.84, this amount reflecting the principal amount of House's liability and accrued interest (R. 125). That judgment was affirmed on appeal. *House v. United States*, 144 F. 2d 555 (C. C. A. 10), certiorari denied, 323 U. S. 781. A writ of execution issued upon the judgment was returned "nothing found" (R. 126-

127), and the judgment has never been paid wholly or in part (R. 2). Petitioner Gotwals acted as counsel for House in defending that suit (R. 11, 17).

During the pendency of the above case there was also pending in the district court the case of *In re Estate of Jackson Barnett, deceased*, Equity No. 4556, hereinafter referred to as the *Barnett* case, in which House acted as counsel for certain Indian claimants to the estate, and in which cause also the United States intervened (R. 13). On October 27, 1942, fifteen days after the entry of findings and conclusions in the *House* case providing for judgment in favor of the Government against House, and eleven days before the judgment was formally entered, House assigned to petitioner all fees and proceeds to accrue to House in the *Barnett* case (R. 135-136). While the assignment bore the date of October 27, 1942, the petitioner did not reveal its existence until November 22, 1944, over two years later, when he sent a copy of the assignment to the Superintendent of the Indian Agency (Gov't Ex. 6, R. 137).

On June 23, 1943, a decree was entered against the United States in the *Barnett* case which awarded House an amount of \$13,582.79 (R. 2, Fdgs R. 17-18). That decree was affirmed on appeal, *sub nom. United States v. Anglin & Stevenson*, 145 F. 2d 622 (C. C. A. 10), certiorari denied, 324 U. S. 844. Thereafter the United

States paid into the registry of the district court sufficient funds to satisfy the claims of all parties under the aforementioned decree with the exception of the claim of House. Since the Government had an unsatisfied and uncollectible judgment against House in the amount of \$76,860.84, it withheld \$13,582.79, the amount awarded House in the *Barnett* case.

The Government filed in the *House* case, Civil No. 49, its petition (R. 1-4) setting out the foregoing facts; so far as presently material, it was alleged that House was insolvent at the time he executed the assignment to petitioner, and that the United States, as a judgment creditor of House, was entitled to priority to the funds due House. The Government asked that it be allowed a credit of \$13,582.79 on the *Barnett* judgment and that House be allowed a similar credit on the judgment against him in the *House* case. A similar petition was filed in the *Barnett* case (R. 5-8).

Notice of these petitions was served upon House and petitioner Gotwals. House did not answer, but petitioner did. For present purposes the answer may be summarized as alleging that House was indebted to Gotwals for legal services rendered in an amount in excess of the \$13,582.79 covered by the assignment; that the assignment was obtained by petitioner for the sole purpose of collecting his fees; that House

had a right to make the assignment and that petitioner had a right to accept it and to retain the benefit of it. The answer closed with a prayer for dismissal of the Government's petition and for an order directing payment of the \$13,582.79 to petitioner (R. 9-13).

At the trial the Government called House and petitioner as witnesses. Both testified that the assignment of October 27, 1942, was based upon consideration in the form of indebtedness of House to Gotwals for legal services in various cases. The testimony of House established that at the time he executed the assignment he had insufficient property to pay his debts; his testimony also shows that he intended to prefer petitioner over the United States (R. 54-55). Petitioner, as counsel for House, knew all of the facts, and his testimony (R. 58-59, 73) shows that in obtaining the assignment from House he "wanted to be a preferred creditor" (R. 59).

The trial court found that House was indebted to Gotwals in an amount in excess of the fund covered by the assignment and that therefore the assignment was valid. So nearly as can be determined, that court simply concluded that since the assignment was valid as between House and the petitioner, and since Oklahoma law permitted an insolvent debtor to prefer a creditor, no priority to the fund existed in favor of the United States under 31 U. S. C. sec. 191 (R. 13-30).

Judgment in favor of petitioner was duly entered, from which judgment the Government appealed (R. 30-31).

Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, it was held, with Judge Phillips dissenting, that the execution of the assignment by House while insolvent, with the intent to prefer petitioner over the United States, constituted an act of bankruptcy; that accordingly a priority arose in favor of the United States under the federal priority statute, and that the judgment should be reversed (R. 139-144). In his dissenting opinion Judge Phillips agreed that an act of bankruptcy was committed by House when the assignment was executed, but was apparently of the view that the priority could be asserted by the Government only in a bankruptcy proceeding instituted within four months of the date of the assignment (R. 144-147).

#### • ARGUMENT

R. S. 3466, 31 U. S. C. sec. 191 has always been liberally construed to effectuate its obvious intent to assure prior settlement of federal indebtedness. *Beaston v. Farmers' Bank*, 12 Pet. 102, 134; *Bramwell v. U. S. Fidelity Co.*, 269 U. S. 483, 487. The priority arises whenever one of three independent grounds stated in the statute is made to appear. *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 438, 439; *United States v. State Bank of*

*North Carolina*, 6 Pet. 29, 35; *Field v. United States*, 19 Pet. 182, 201; *United States v. Oklahoma*, 261 U. S. 253, 259-262. And whenever a transfer of property by the Government's insolvent debtor is in one of the modes named in the statute, the party receiving the same holds the property as trustee for the Government's benefit. *Beaston v. Farmers' Bank*, 12 Pet. 102, 133.

One of the independent acts of an insolvent debtor which generates the priority is the commission of an act of bankruptcy. The court below found (R. 142, 144) that in making the assignment to petitioner, House intended to prefer petitioner over the United States, and that his act constituted an act of bankruptcy under 11 U. S. C. sec. 21. Petitioner does not challenge this finding.<sup>1</sup> Moreover, while the intention of House to prefer is sufficient to constitute the act of bankruptcy, it may be noted that petitioner testified that he "wanted to be a preferred creditor of Mr. House" and that he did not know if House could pay the Government's judgment against him (R. 59, 73). Thus the intent of both parties was to avoid the "clear command" of the statute. Cf. *Illinois v. United States*, No. 749, October Term, 1945.

Petitioner (Pet. 5) seemingly seeks to avoid the statute by arguing that an assignment for

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<sup>1</sup> Neither does petitioner question that House was insolvent within the meaning of the priority statute.

the benefit of all creditors is essential to the existence of the priority. But a voluntary assignment is but one of the actions of a debtor which raises the priority. The ground of decision below is the admitted existence of the third independent ground, the commission of an act of bankruptcy. The language quoted by petitioner from this Court's decision in *Bramwell v. U. S. Fidelity Co.*, 269 U. S. 483, does not support his argument. On the contrary, this Court there said (269 U. S. 487): "Appellee is entitled to priority if, within the meaning of § 3466, the bank made a voluntary assignment of its property or committed an act of bankruptcy." [Italics supplied.]

Petitioner, while not questioning that the assignment was made to prefer him over the Government, and thus constituted an act of bankruptcy as defined by 11 U. S. C. sec. 21, relies upon the law of Oklahoma as permitting an insolvent debtor to prefer a creditor (Pet. 4, 8). But state law cannot affect the Government's priority under the federal statute. *Field v. United States*, 9 Pet. 182, 200; *United States v. Oklahoma*, 261 U. S. 253, 260; cf. *Sperry Oil Co. v. Chisholm*, 264 U. S. 488, 494.

The cases cited by petitioner (Pet. 7-8) lend no support to his position. *United States v. Oklahoma*, 261 U. S. 253, dealt only with the test of insolvency under R. S. 3466, a matter not in ques-

tion here. *United States v. Fisher*, 2 Cranch 358, held that the priority statute was aimed not only at debts due the Government from revenue officers and custodians of public funds, but embraced debts due the United States from all classes of debtors. *Thelusson v. Smith*, 2 Wheat. 396, does not, as petitioner suggests, hold that the priority arises only where there has been a voluntary assignment. The court was simply stating the proposition, already settled by *United States v. Fisher, supra*, and *United States v. Hooe*, 3 Cranch 73, that a mere state of insolvency, without more, did not give rise to priority. The *Thelusson* case held only that a lien existing upon a debtor's property before the federal priority accrued was protected. The facts in *United States v. Hooe*, 3 Cranch 73, bear no resemblance to those in the case at bar; no question of the effect of the commission of an act of bankruptcy was presented.

The cases of *Van Iderstine v. Nat. Discount Co.*, 227 U. S. 575, and *Adams v. Champion*, 294 U. S. 231, are not in point because no question of federal priority under R. S. 3466 was involved in either. So far as the instant case is concerned, the bankruptcy law, 11 U. S. C. sec. 21, simply defines the nature of an act by an insolvent debtor to the Government which Congress has ordained shall create the priority. As stated by this Court

in *Bramwell v. U. S. Fidelity Co.*, 269 U. S. 483, 490:

\* \* \* The reference to an act of bankruptcy in § 3466 is general, and is for the purpose of defining one of the ways in which the debtor's insolvency may be manifested. The priority given does not depend on any proceeding under the bankruptcy laws of state or nation.

It may also be noted, with regard to Judge Phillips' view (R. 145), that by reason of the concealment of the assignment by petitioner for a period of two years, no proceeding in bankruptcy could have been brought within four months of the date of the assignment. Moreover, the priority statute itself fixes the time when the priority takes effect, and the existence of the priority does not depend upon the time of bringing an action to enforce it. *United States v. Fisher*, 2 Cranch 358, 393. To hold that the Government's priority could only be enforced in bankruptcy proceedings would read into the statute a limitation upon the priority granted which Congress did not see fit to impose.

#### CONCLUSION

Petitioner and House clearly undertook to secure a preference for petitioner over the claim of the United States; he does not contend otherwise. Since the act of House under which petitioner claims is the very act upon which Congress

has seen fit to base the priority of the United States, his position here is untenable. The question presented was correctly decided below, no conflict of decision is shown, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,  
*Acting Solicitor General.*  
DAVID L. BAZELON,  
*Assistant Attorney General.*  
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*Attorneys.*

NOVEMBER 1946.